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No. 00-101

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 2000

JOHN G. STRAND, JOHN C. SHEA, AND DAVID A. SVANDA, COMMISSIONERS OF THE MICHIGAN PUBLIC SERVICE COMMISSION,

Petitioners,

v.

VERIZON NORTH INCORPORATED, UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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September 18, 2000

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QUESTIONS PRESENTED

The Telecommunications Act of 1996 requires incumbent local telephone companies, such as Verizon North Incorporated, to sell "elements" of their networks to competitors and establishes a specific process for creating "interconnection agreements" that set the terms for such sales. Where a state public utility commission enters an order requiring the sale of such "network elements" without regard for the process mandated in the 1996 Act:

(i) Does the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), apply to permit a plaintiff to bring a suit against state officials in their official capacities seeking prospective injunctive relief to stop an ongoing violation of federal law where the federal law being violated is the Telecommunications Act?

(ii) Does a federal district court have federal question jurisdiction under 28 U.S.C. § 1331 to hear a claim that a state public utility commission order conflicts with and is preempted by the federal Telecommunications Act?

(iii) Does the Johnson Act, 28 U.S.C. § 1342, divest a federal district court of jurisdiction to hear a complaint that challenges an order of a state utility commission based on a claim of preemption under a federal statute?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, respondent Verizon North Incorporated hereby states that it is a second-tier subsidiary of Bell Atlantic Corporation d/b/a Verizon Communications. Verizon North was formerly known as GTE North Incorporated, which was a subsidiary of GTE Corporation. On June 30, 2000, GTE Corporation merged with a wholly owned subsidiary of Bell Atlantic Corporation (with GTE Corporation as the surviving first-tier subsidiary of Bell Atlantic Corporation), and Bell Atlantic Corporation began doing business as Verizon Communications. Bell Atlantic Corporation d/b/a Verizon Communications has no parent companies and no publicly held company has a 10 percent or greater ownership interest in Bell Atlantic Corporation d/b/a Verizon Communications.

As a result of the merger, GTE North Incorporated changed its legal name as of June 30, 2000 to Verizon North Incorporated.

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BRIEF IN OPPOSITION

INTRODUCTION

The Commissioners of the Michigan Public Service Commission ("Michigan Commissioners") ask this Court to review three rulings from the Sixth Circuit's decision below: (i) that a federal district court has general federal question jurisdiction to hear a claim that a state public utility commission order conflicts with and is preempted by the federal Telecommunications Act of 1996 ("Act" or "1996 Act"); (ii) that the Commissioners are subject to suit in such a preemption action under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908); and (iii) that the Johnson Act does not bar such a statutory preemption claim. Each of those decisions

involved nothing but a straightforward (and correct) application of settled principles of law to this case, and none warrants this Court's attention. Indeed, the Commissioners cannot and do not allege a circuit conflict on any of these issues.

Instead, they focus their attention primarily on rearguing the merits of the case. In their view, because the 1996 Act contains an express provision for federal district court review of some state commission actions in section 252(e)(6), that section should be viewed as the exclusive mechanism for bringing a federal court challenge to any state commission action bearing on the 1996 Act.

Section 252(e)(6), however, provides for review only of a specific type of state commission order. The 1996 Act requires carriers to go through a detailed negotiation and arbitration process to create "interconnection agreements" implementing the terms of the Act. Section 252(e)(6) provides for review of state commission determinations concerning those interconnection agreements. The entire point of this case, however, was that the order being challenged here was issued *outside* the section 252 process for establishing interconnection agreements. The order thus was not subject to review under section 252(e)(6). The Sixth Circuit rightly concluded that, in such circumstances, section 252(e)(6) could not be treated as an alternative means of review curtailing the ordinary scope of general federal question jurisdiction over a preemption claim. Any other conclusion would have produced the anomalous result that state commissions could ignore the terms of the Act, circumvent its procedures entirely, and yet remain immune from any challenge in federal court charging that they had violated the Act. The Sixth Circuit, in other words, simply decided that by providing for review of one type of state commission action taken within the procedures established by the Act, Congress did not intend to cut off ordinary federal question jurisdiction over all other claims of violations of the Act.

Nothing about that straightforward decision under settled principles of law warrants this Court's review.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331; the Court of Appeals had jurisdiction under 28 U.S.C. § 1291. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

COUNTERSTATEMENT OF THE CASE

A. The 1996 Act and Interconnection Agreements

In the Telecommunications Act of 1996, Congress chose to open local telecommunications markets to competition. To pave the way for competition, the 1996 Act imposes a number of duties on telecommunications carriers – in particular, on incumbent local exchange carriers (or incumbent "LECs") such as Verizon.[1] Section 251(c) of the Act, 47 U.S.C. § 251(c), requires an incumbent LEC to: (i) allow an entrant to interconnect with its network so that the entrant may carry calls to and from customers served on the incumbent's network, *id.* § 251(c)(2); (ii) sell an entrant access to pieces or "elements" of the incumbent LEC's call-routing network "on an unbundled basis" in "a manner that allows requesting carriers to combine such elements" to provide service, *id.* § 251(c)(3); and (iii) sell an entrant the incumbent's finished retail services at wholesale prices so that the entrant can resell those services in their entirety to its own customers, *id.* § 251(c)(4).

Congress simultaneously established an elaborate federal regulatory structure to ensure that the duties imposed on the incumbent LECs would be implemented fairly and uniformly. To start, Congress preempted all state laws that would prevent competitive entry. *See* § 253(a). In addition, Congress established a specific process for creating "interconnection

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[1] As a result of the June 30, 2000 merger of GTE Corporation and Bell Atlantic Corporation, respondent GTE North Incorporated changed its legal name to Verizon North Incorporated. *See* Rule 29.6 Statement, *supra* p. ii. This brief will therefore refer to "Verizon" throughout.

agreements" that would implement the duties in the Act. The Act requires carriers first to negotiate in good faith. *See* §§ 251(c)(1), 252(a)(1). If negotiations do not produce an agreement, either party may (under a statutory timetable, *see* § 252(b)(1)), seek binding arbitration before a state public utility commission. *See* § 252(b). States, however, were given a choice about accepting this role as arbitrators in the novel federal regulatory scheme. Congress made clear that if a State chose not to participate, the FCC would take over its role. *See* § 252(e)(5).

Congress then specified federal standards that state commissions would be required to apply in conducting arbitrations to establish interconnection agreements. *See* §§ 252(c), (d). For example, the Act imposed federal standards that state commissions must follow when determining the rates that may be charged for interconnection and network elements: the rates must be just, reasonable and based on the incumbent LEC's costs. *See* §§ 251(c)(3), 252(d)(2). Congress insisted, moreover, that *all* interconnection agreements – whether voluntarily negotiated or arbitrated – must be submitted to state utility commissions for approval. *See* §§ 252(a)(1), (e)(1).

Finally, Congress provided for exclusive jurisdiction in the federal courts to review States' decisions implementing the Act through the arbitration process outlined in section 252. Section 252(e)(6) provides that in cases where a state commission approves, interprets or enforces an agreement formed pursuant to the procedures outlined in section 252, "any party aggrieved" by the determination may bring an action in district court. To guarantee federal review, moreover, Congress precluded state courts from hearing claims relating to a State's decisions under section 252. *See* § 252(e)(4) ("No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.").

As this Court has explained, the 1996 Act thus "fundamentally restructur[ed] local telephone markets," and

through the Act the "Federal Government has taken the regulation of local telecommunications competition away from the States." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371, 378 n.6 (1999).

B. The Michigan Commission's Order

In March 1996, in accordance with the procedures set out in sections 251 and 252 of the Act, both AT&T and Sprint requested negotiations with Verizon to establish interconnection agreements setting terms for the sale of both network elements and wholesale service. When these negotiations did not produce agreements, both AT&T and Sprint petitioned the Michigan Public Service Commission ("MPSC") for arbitration and the MPSC conducted arbitrations under the Act. In December 1996 and January 1997, the MPSC entered orders in each arbitration resolving disputed issues. Verizon and both AT&T and Sprint incorporated the MPSC's arbitration decisions into agreements that were submitted to the MPSC, but more than a year later the MPSC had not issued final approval of the agreements.[2]

At the same time that it entered its order in the AT&T arbitration, the MPSC acted on its own motion to initiate a new, separate proceeding to approve final cost studies for Verizon to be used in setting the prices of network elements and other services. On February 25, 1998, the MPSC issued a final order that required Verizon to file tariffs making its network elements and wholesale services available to any interested party at prices that would be predetermined by the MPSC. Under the Order, Verizon would have to provide the elements and services at fixed prices under the tariff to any party seeking to purchase them – even if the purchasing party had not negotiated or arbitrated an interconnection agreement

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[2] The MPSC did not give final approval to either agreement until August 1999. Thus, for most of the pendency of this litigation, there was no finally approved interconnection agreement between Verizon and any requesting carrier.

with Verizon under the terms of the Act. The Order also required that Verizon offer network elements in combinations or "platforms," rather than solely as "unbundled" elements.

C. The District Court's Decision

On March 18, 1998, Verizon filed this action in the United States District Court for the Western District of Michigan challenging the February 25, 1998 Order on the grounds that it conflicts with and is preempted by the governing terms of the Telecommunications Act of 1996 and violates rights secured to Verizon under the Act.[3] Proceeding against the individual Michigan Commissioners under 42 U.S.C. § 1983 and the doctrine of *Ex parte Young*, Verizon asserted that the Order conflicts with the 1996 Act in two fundamental ways. First, by requiring Verizon to file *tariffs* offering network elements and wholesale services for sale to any interested party, the Order displaces the individualized negotiation and arbitration process established by the 1996 Act for entrants to obtain these elements and services from incumbent LECs. A tariff constitutes, in itself, an offer for sale. Thus, under the tariffing system established by the Order, Verizon would be required to sell network elements to any carrier requesting them from the tariff, even if that carrier never established an interconnection agreement with Verizon under the procedures specified in the Act. Second, by requiring Verizon to offer network elements in pre-assembled combinations or "platforms" – including combinations of elements that did not already exist in Verizon's network – the Order conflicted with the limited duty the Act imposed on incumbents to provide elements on an "unbundled basis" and "in a manner that allows requesting carriers to combine such elements in order to provide" service. § 251(c)(3).

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[3] Over two months later, on June 10, 1998, Verizon also filed a timely appeal in the Michigan Court of Appeals to preserve its rights in the event that the federal case were erroneously dismissed. That case has been held in abeyance pending the outcome of the federal court litigation.

The district court dismissed the action for lack of jurisdiction. The court concluded that section 252(e)(6) of the Act provides the exclusive procedure for obtaining review of any MPSC Order relating to the Act and that Verizon could not satisfy the prerequisites for review under that section because the MPSC had not entered an order giving final approval to a completed interconnection agreement.[4] The court acknowledged that section 252(e)(6) could be construed as an exclusive avenue for review foreclosing ordinary federal question jurisdiction over Verizon's preemption claims under 28 U.S.C. § 1331 only if it provided an adequate means of review. The court asserted that it did provide such adequate review, even though Verizon could not proceed under section 252(e)(6) at the time (due to the lack of an order finally approving an interconnection agreement), because Verizon might obtain review of the terms of the Order "*if* they are incorporated into or give rise to a final agreement and are submitted to this Court pursuant to section 252(e)(6)." Pet. App. 30a (emphasis added).

D. Review in the Sixth Circuit

Verizon appealed the district court's jurisdictional ruling and explained that the district court had erred in construing section 252(e)(6) as the exclusive avenue for federal court jurisdiction over any claim that any state commission action violated the 1996 Act. The ruling, indeed, left Verizon in an impossible Catch-22. Verizon could not seek review of the Order under section 252(e)(6) because there was no MPSC order giving final approval to a completed interconnection agreement. And the district court's suggestion that Verizon could obtain review

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[4] In cases *involving arbitrations under section 252 of the Act*, numerous district courts had determined that, to ensure that courts would not be reviewing interlocutory orders from state commissions in the midst of arbitrations, a prerequisite for jurisdiction under section 252(e)(6) was an order giving final approval to a completed interconnection agreement. *See, e.g.*, *GTE Fla. Inc. v. Johnson*, 964 F. Supp. 333 (N.D. Fla. 1997); *GTE S., Inc. v. Morrison*, 957 F. Supp. 800 (E.D. Va. 1997).

"if" the terms of the Order were incorporated into an interconnection agreement provided no assured means of review either, because part of the very illegality in the Order that Verizon was challenging was that it circumvented entirely the process under the Act that would produce interconnection agreements. In other words, the tariffing order eliminated the need for requesting carriers ever even to begin the statutory negotiation and arbitration process that would lead to a final interconnection agreement – and it was only a final interconnection agreement that would allow review under section 252(e)(6). Thus, the district court's ruling would allow a state commission to ignore the terms of the Act and at the same time remain immune from review in federal court.

A unanimous panel of the United States Court of Appeals for the Sixth Circuit reversed the jurisdictional ruling and remanded for further proceedings in the district court. Pet. App. 22a. The court ruled first that the district court has federal question jurisdiction over Verizon's claims under 28 U.S.C. § 1331. *Id.* at 9a. The court held that the limitation on section 252(e)(6) review to cases in which the state commission makes a determination under section 252 "plainly does not preclude review of the February 25 Order, which was entered in an independent state law proceeding unrelated to the AT&T-Sprint arbitration." *Id.* Applying standard principles of construction, the court concluded that "[t]he text and legislative history of the [1996 Act] make clear that § 252(e)(6) is the exclusive basis for federal judicial review *only of orders entered in negotiation or arbitration proceedings under § 252 of the Act*," not orders entered in separate proceedings under state law. *Id.* at 10a (emphasis added). The court noted that section 252(e)(6) posed no bar to federal court jurisdiction for the further reason that "even if one could interpret § 252(e)(6) to encompass [Verizon's] claims, to do so would frustrate Congress's intent by allowing state commissions to insulate from federal review decisions allegedly preempted by, or otherwise contrary to, federal telecommunications law." *Id.* at 9a.

The court concluded that even though the requirements of the February 25 Order *might* eventually be incorporated into a final interconnection agreement subject to section 252(e)(6) review, that possibility could not suffice to treat section 252(e)(6) as the *exclusive* avenue for federal court jurisdiction. An interested buyer could enforce the requirements of the tariff demanded by the Order (and thus obtain access to Verizon's network elements and services) without ever executing a final interconnection agreement that would be reviewable under section 252(e)(6). *Id.* at 12a-13a. Thus, section 252(e)(6) could not be treated as providing the exclusive avenue for federal judicial review of Verizon's federal claims, because that provision might *never* provide federal court review of the February 25 Order. *Id.* at 14a.

The Sixth Circuit also rejected the applicability of various abstention doctrines raised by the Michigan Commissioners and concluded that the Johnson Act, 28 U.S.C. § 1342 (1994), also did not apply to bar jurisdiction over Verizon's claims. The court explained that the Johnson Act applies only when "[j]urisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution," *id.*, and in this case jurisdiction was based on alleged violations of Verizon's statutory rights under the 1996 Act. Pet. App. 20a.

The Sixth Circuit therefore reversed and remanded for the district court to address the merits of Verizon's claims. *Id.* at 17a.[5]

REASONS FOR DENYING THE WRIT

I. THERE IS NO CIRCUIT CONFLICT ON ANY OF THE ISSUES RAISED IN THE PETITION.

The Commissioners challenge the Sixth Circuit decision on three grounds: (i) that there is no general federal question

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[5] Briefing on the motion for summary judgment that will resolve the case in the district court will be completed on September 25, 2000, and the case has been scheduled for argument on October 5, 2000.

jurisdiction over this case under 28 U.S.C. § 1331; (ii) that the Commissioners are immune from suit because the *Ex parte Young* exception to the Eleventh Amendment is inapplicable; and (iii) that the Johnson Act bars district court jurisdiction. The petition does not identify a single circuit conflict on any of these issues.

1. The Commissioners do not even purport to present any circuit conflict on the Sixth Circuit's core decision that section 252(e)(6) does not provide the *sole* means for challenging any state action as a violation of the 1996 Act and that the district court therefore had federal question jurisdiction under 28 U.S.C. § 1331 to hear Verizon's claim of preemption in this case. As far as Verizon is aware, the Sixth Circuit is the only Court of Appeals that has addressed this issue.

2. The premise of the Commissioners' second argument is that section 252(e)(6) properly applies here and that *Ex parte Young* cannot be used under that section. Even accepting, *arguendo*, the premise that section 252(e)(6) provides the framework for analysis here, the Commissioners still cannot point to any conflict in authority on their argument concerning *Ex parte Young*. To the contrary, every Court of Appeals that has addressed that question in cases genuinely arising under section 252(e)(6) has determined that the *Ex parte Young* doctrine applies. *See MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 2000 WL 1010863, *20 (7th Cir. July 24, 2000) ("[W]e hold that *Seminole Tribe* does not preclude an *Ex parte Young* suit against the state commissioners here."); *MCI Telecomms. Corp. v. Public Serv. Comm'n*, 216 F.3d 929, 940 (10th Cir. 2000) ("Thus, we hold that under *Ex parte Young*, the Eleventh Amendment does not bar U.S. West's suit against the individual commissioners."); *see also Bell Atl.-Pa., Inc. v. Pennsylvania Pub. Util. Comm'n*, 107 F. Supp. 2d 653, 664 (E.D. Pa. 2000) ("Thus, the court joins with the Sixth, Seventh, and Tenth Circuits in holding that this action may proceed against the individual commissioners for prospective injunctive relief.").

3. The Commissioners likewise do not identify any decision contradicting the Sixth Circuit's conclusion that the Johnson Act does not bar district court jurisdiction over statutorily based federal preemption claims – much less do they point to such a case in the context of preemption by the 1996 Act. Nor could they. It is well settled that a statutorily based federal preemption claim, such as Verizon's claims that the MPSC's February 25, 1998 Order conflicts with and is preempted by the 1996 Act, is not based "solely on . . . repugnance of the order to the Federal Constitution," 28 U.S.C. § 1342(1), as required for the Johnson Act to apply. Rather, such a claim is based on the order's repugnance to a federal *statute*. The fact that the Supremacy Clause allows the federal statute to trump the state commission order does not convert the statutorily based claim into one based "solely on . . . repugnance of the order to the Federal Constitution."

Thus, every Court of Appeals to address the issue has agreed that "a statutorily based preemption claim does not provide a basis for invoking the Johnson Act to deprive a federal court of jurisdiction." *Freehold Cogeneration Assocs. v. Board of Regulatory Comm'rs*, 44 F.3d 1178, 1186 (3d Cir. 1995); *accord Arkansas Power & Light Co. v. Missouri P.S.C.*, 829 F.2d 1444, 1449 (8th Cir. 1987); *Hawaiian Tel. Co. v. Public Utils. Comm'n*, 827 F.2d 1264, 1273 (9th Cir. 1987); *Aluminum Co. of Am. v. Utilities Comm'n*, 713 F.2d 1024, 1028 (4th Cir. 1983). Indeed, the as the First Circuit recently noted, the "case law on this point is so clear cut that no further discussion of the point is required." *Public Serv. Co. v. Patch*, 167 F.3d 15, 25 (1st Cir. 1998).[6]

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[6] These cases are consistent with this Court's opinion in *Hagans v. Lavine*, 415 U.S. 528 (1974), because *Hagans* did *not* hold that preemption claims are based *exclusively* on the "repugnance . . . to the Federal Constitution." Rather, *Hagans* merely noted the unremarkable proposition acknowledged in the cases above that to resolve a preemption claim a court must "*resort to* the Federal Constitution." *Id.* at 533 n.5 (emphasis added). *Hagans* did

(continued...)

The Michigan Commissioners candidly concede that the law is uniform on this basic point. They attempt to imply, however, that there is some conflict because "another federal statute, 42 U.S.C. §1983, has been found unenforceable in federal district court and barred by the Johnson Act." Pet. 23. But that assertion is misleading. The section 1983 cases cited by the Commissioners are entirely consistent with the principle that the Johnson Act does not bar a statutory preemption claim. Section 1983 does not create substantive rights in itself; rather, it creates a remedy (a cause of action for damages) for violations of substantive rights provided by some other source of law – specifically the "Constitution and laws," 42 U.S.C. § 1983, of the United States. *See Wilson v. Garcia*, 471 U.S. 261, 278 (1985). A section 1983 case thus is not based on a "violation" of section 1983 itself, but on a violation of some other federal right. And in the cases cited by the Commissioners, such as *J & A Realty v. City of Asbury Park*, 763 F. Supp. 85 (D.N.J. 1991), the section 1983 claims were based solely on violations of *constitutional*, rather than statutory, rights. *See id.* at 87. Those cases thus fall squarely within the Johnson Act's bar on actions where jurisdiction is based "solely on . . . repugnance of the order to the Federal Constitution." 28 U.S.C. § 1342(1). They in no way suggest a conflict with the Sixth Circuit's ruling here that claims based on a violation of a federal *statute* are not barred by the Johnson Act.

II. THE COMMISSIONERS' PARADE OF HORRIBLES IS BASELESS.

Because the Michigan Commissioners cannot claim that the Sixth Circuit's decision creates any conflict among the Courts of Appeals, they resort primarily to a parade of horribles. A central theme of their petition is that the Sixth Circuit decision will somehow accomplish a radical expansion of federal

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[6] (...continued)
not even address the Johnson Act.

jurisdiction and transform the federal district courts into "the primary appellate court to review virtually all intrastate telecommunications ratemaking orders of a state commission." Pet. 8; *see also id.* at 15, 16-18. Such claims are meritless.

The Sixth Circuit's decision simply acknowledges that a claim that a state commission has taken action in conflict with the 1996 Act raises a federal question cognizable in federal district court. It is true that the 1996 Act substantially extended the reach of federal law into matters involving intrastate telecommunications. As this Court made clear only two Terms ago in *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), the Act "fundamentally restructures local telephone markets," *id.* at 371. By dictating that local telephone service must be opened to competition and by detailing duties on carriers that would foster competition, the Act federalized a substantial portion of the regulation of the local exchange. The Court could not have made this increased federal supervision clearer, as it explained that under the 1996 Act there can be no question "whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has." *Id.* at 378 n.6.

Any expansion of the role that federal courts might have in hearing challenges to state commission actions is thus a direct function of Congress' decision to extend federal law into regulating competition in the local exchange.[7] Indeed, in *AT&T Corp.* this Court expressly acknowledged the role the courts would have under the Act as it explained that "there is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy,

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[7] It also bears noting that the Commissioners' suggestion that the order at issue here addressed solely "intrastate telecommunications ratemaking," Pet. 9, is inaccurate. The order addressed the rates that would be paid for network elements under the 1996 Act. That rate gives the purchaser full use of the element for carrying both *intra*state and *inter*state telecommunications. It is not merely an "intrastate" rate.

they may bring it to heel." *AT&T Corp.*, 525 U.S. at 379 n.6.[8] The Sixth Circuit merely recognized the same principle: when a party brings a claim that a state commission has taken action in violation of the 1996 Act, that claim – just like any other claim that a state law conflicts with a federal statute – raises a federal question within the jurisdiction of the federal courts to decide.

III. THE SIXTH CIRCUIT'S DECISION PRESENTS NOTHING BUT A STRAIGHTFORWARD AND CORRECT APPLICATION OF SETTLED LAW TO THE FACTS OF THIS CASE.

Far from raising any conflict in authority, the Sixth Circuit's decision presents solely a straightforward application of settled principles of law to the facts of this case.

1. Federal question jurisdiction exists in this case under 28 U.S.C. § 1331. It is undisputed that the claims in Verizon's complaint arise under federal law. Verizon has alleged that the MPSC's order violates the 1996 Act, infringes Verizon's rights under the Act, and is preempted by federal law. It is well-settled that these are the types of federal questions over which a district court has jurisdiction under 28 U.S.C. § 1331. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) ("A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.") (citation omitted). Thus, the Michigan

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[8] The Commissioners' suggestion that the Court in *AT&T Corp.* somehow endorsed the view that the 1996 Act preserved state control over *all* ratemaking bearing on intrastate telecommunications – and in particular ratemaking related to network elements – is simply mistaken. *See* Pet. 14, 19. In the footnote the Commissioners cite, the Court was describing an interpretation of the Act that it *rejected*. *See AT&T Corp.*, 525 U.S. at 385 n.10.

Commissioners are left to argue that the district court cannot exercise federal question jurisdiction under section 1331 because the review provision in section 252(e)(6) provides the exclusive method of obtaining federal court review of any claim that a state commission action violates the 1996 Act.

Applying settled principles of statutory construction, the Sixth Circuit correctly concluded that section 252(e)(6), by its terms, could not be stretched so broadly. Section 252(e)(6) provides that "[i]n any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the [interconnection] agreement . . . meets the requirements of section 251 and this section [252]." 47 U.S.C. § 252(e)(6). As its terms make clear, the section applies when a state commission makes a determination in a proceeding concerning an interconnection agreement under section 252. As the Sixth Circuit concluded, the "text and legislative history of the [1996 Act] make clear that § 252(e)(6) is the exclusive basis for federal judicial review *only of orders entered in negotiation or arbitration proceedings under § 252 of the Act.*" Pet. App. 10a (emphasis added). *See also id.* at 16a ("Section 252(e)(6) circumscribes federal review only of cases born of § 252 proceedings."). In the Order at issue here, the MPSC was not arbitrating or approving a final interconnection agreement; rather, the MPSC purported to be exercising authority under state law to impose obligations on Verizon entirely *outside* the purview of any interconnection agreement under section 252 of the Act. Because the MPSC's order was issued pursuant to a proceeding that was independent of the arbitration and approval process provided for in the Act, the limits on federal court jurisdiction for reviewing decisions made pursuant to that process simply do not apply here.

The Sixth Circuit similarly applied settled principles from this Court's decisions in *Califano v. Sanders*, 430 U.S. 99 (1977), and *Thunder Basin Coal v. Reich*, 510 U.S. 200 (1994),

to conclude that, because section 252(e)(6) simply did not provide an adequate means of review here, it could not be treated as an exclusive review mechanism that curtailed ordinary federal question jurisdiction. As the Sixth Circuit pointed out, if section 252(e)(6) prohibited all federal court review until the requirements of the MPSC's Order were incorporated into a final interconnection agreement under section 252, then the Order could be enforced against Verizon without Verizon *ever* obtaining federal court review of its federal claims. *See* Pet. App. 21a-22a. Verizon could not seek review under section 252(e)(6) at the time the Order was entered because there was no finally approved interconnection agreement. And there was no assurance that section 252(e)(6) would even provide deferred review, because there was no guarantee that the terms of the Order would *ever* be incorporated into an interconnection agreement. To the contrary, part of the very illegality in the Order that Verizon was challenging was that it circumvented entirely the process under the Act that would produce interconnection agreements. The tariffing order eliminated the need for requesting carriers even to enter into the statutory negotiation and arbitration process that would lead to a final interconnection agreement – and it was only a final interconnection agreement that would allow review under section 252(e)(6).[9] As the Sixth Circuit

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[9] The Commissioners' repeated suggestions that it was somehow inevitable that the terms of the tariff would be included in a final interconnection agreement and that Verizon "admitted that the tariffed rates for unbundled network elements would *undoubtedly* find their way into a final interconnection agreement," Pet. 20 (emphasis added), are false. Verizon acknowledged only that the terms of the tariff *might* be incorporated in a final interconnection agreement *if* some requesting carrier decided to adopt them and press an arbitration to completion – which no carrier would need to do because it could purchase elements directly from the tariff. In any event, to the extent the Commissioners base their arguments on a factual dispute with the premises underlying the Sixth Circuit's decision, they plainly do not raise an issue meriting this Court's review.

The fact that the MPSC did eventually give final approval to an

(continued...)

concluded, "the reason § 252(e)(6) does not provide for adequate review of the challenged order . . . is that an interested buyer could enforce the tariffs established in the February order in the Michigan courts without ever executing a final interconnection agreement with [Verizon]," and thus without ever triggering the prerequisite for jurisdiction under section 252(e)(6). Pet. App. 13a. Once again, the Court of Appeals' application of settled principles of construction was plainly correct.

Indeed, any other conclusion would have provided a veritable blueprint for state commissions to evade the terms of the 1996 Act. A state commission could simply (like the MPSC here) impose rates or access requirements through proceedings under state law, rather than through arbitration and approval of interconnection agreements under section 252. Its order would then be unreviewable in federal court under section 252(e)(6) (because there would be no final interconnection agreement), and there would be no other avenue into federal court to assert the claim that the state commission had violated the Act. As the Sixth Circuit explained, accepting the Commissioners' arguments here would mean that "state commissions may insulate regulatory requirements that violate the [1996 Act] from federal . . . court review." Pet. App. 16a. The Sixth Circuit's decision precluding such an end-run around the terms of the Act was plainly correct.

2. The Ex parte Young *Exception to the Eleventh Amendment Applies.* This is a straightforward *Ex parte Young* case. *See Ex parte Young*, 209 U.S. 123 (1908). It is long

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[9] (...continued)
interconnection agreement in 1999 – over a year and a half after the Order at issue here was entered – is also immaterial and cannot suffice to make section 252(e)(6) an adequate alternative means of review. The Order immediately imposed a binding obligation on Verizon to offer network elements for sale under a tariff, and Verizon was entitled to an adequate means of review at the time the Order was entered.

settled that, under *Ex parte Young*, a plaintiff may seek "prospective injunctive relief" against state officials in their official capacities "to prevent a continuing violation of federal law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). As the Court emphasized just two Terms ago, "suits for declaratory or injunctive relief against state officers must . . . be permitted if the Constitution is to remain the supreme law of the land," and *Ex parte Young* is thus an "essential" part of sovereign immunity doctrine. *Alden v. Maine*, 527 U.S. 706, 747-48 (1999). Verizon's complaint plainly meets the requirements for straightforward application of *Ex parte Young*: it seeks only prospective injunctive relief against state officials in their official capacities to halt an ongoing violation of federal law.

As a result, the Michigan Commissioners resort to the same argument they relied upon in attempting to defeat federal question jurisdiction under section 1331 – that Congress set forth the exclusive means of federal court review in section 252(e)(6) and, because that section provides for only limited federal court review, *Ex parte Young* cannot be used to "circumvent" Eleventh Amendment immunity. Pet. 9. This theory is doubly flawed.

First, it is erroneous for the same reason the Commissioners' jurisdictional argument is wrong: this action arises wholly outside the purview of the section 252 process for establishing interconnection agreements and thus wholly outside the scope of section 252(e)(6) review. Section 252(e)(6) does not provide a means for Verizon to bring the claims in this case, and thus any argument that it provides an adequate alternative means of review that must be treated as exclusive is wholly misplaced.

Second, even if this were a section 252(e)(6) case, Verizon would still be able to bring suit against the Michigan Commissioners under *Ex parte Young*. Every Court of Appeals to address the issue has concluded that *Ex parte Young* applies in section 252(e)(6) cases. *See, e.g., MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 2000 WL 1010863 (7th Cir. July 24,

2000); *MCI Telecomms. Corp.v. Public Serv. Comm'n*, 216 F.3d 929, 940 (10th Cir. 2000); *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir. 2000), *pet. for cert. filed*, 68 U.S.L.W. 3742 (U.S. May 15, 2000); *see also Bell Atl.-Pa., Inc. v. Pennsylvania Pub. Util. Comm'n*, 107 F. Supp. 2d 653, 664 (E.D. Pa. 2000).

The Michigan Commissioners rely almost exclusively on *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), for their assertion that *Ex parte Young* cannot apply. But their claims are misplaced. In *Seminole Tribe*, the Court considered whether *Ex parte Young* was available where the federal statute involved contained a "carefully crafted and intricate remedial scheme" that placed "limitations" on the action a party could bring to enforce its rights and was more restricted than straightforward federal court review. *Id.* at 73-74. As the Court explained, the particular statutory mechanism there did not expose a state official "to the full remedial powers of a federal court." *Id.* at 75. In contrast to the statue at issue in *Seminole Tribe*, the 1996 Act does not provide a *limited* remedial scheme that would protect state officials from the full powers of a federal court, and thus it does not suggest any limitation on the applicability of *Ex parte Young*. Rather, as the Seventh Circuit recently explained, section 252(e)(6) authorizes, in the broadest terms, "an action" in federal district court by any aggrieved party to challenge a state commission order, § 252(e)(6), and "is silent as to how a district court would enforce its ruling under that section." *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 2000 WL 1010863, at *20. Thus, unlike the provisions providing *limited* remedies in *Seminole Tribe*, the 1996 Act does not restrict a party's remedy at all. Thus, applying the doctrine of *Ex parte Young* is entirely consistent with the review mechanism provided in section 252(e)(6).

In any event, the application of *Seminole Tribe*'s analysis to the 1996 Act involves only the application of settled principles of law to this case and does not merit this Court's review.

3. The Johnson Act does not bar statutorily-based preemption claims such as this. The Johnson Act, 28 U.S.C. § 1342, limits district court jurisdiction only where each of four conditions is met, including that "[j]urisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution." 28 U.S.C. § 1342. As explained above, *see supra* p. 11, it has long been settled that a statutory preemption claim such as Verizon's – although in some sense founded on the Supremacy Clause – does not qualify under the Johnson Act as a claim for which jurisdiction "is based solely on . . . repugnance of the order to the Federal Constitution." *See Arkansas Power & Light Co. v. Missouri P.S.C.*, 829 F.2d 1444, 1449 (8th Cir. 1987) ("[A]ll of the appellate authority in point of which we are aware upholds federal jurisdiction in utility rate cases where a substantial claim of federal statutory preemption is pleaded."); *see also Freehold Cogeneration Assocs. v. Board of Regulatory Comm'rs*, 44 F.3d 1178, 1186 (3d Cir. 1995); *Hawaiian Tel. Co. v. Public Utils. Comm'n*, 827 F.2d 1264, 1273 (9th Cir. 1987). None of the cases cited by the Michigan Commissioners (including cases brought under section 1983) is to the contrary. *See supra* pp. 11-12.

IV. THIS CASE IS STILL IN AN INTERLOCUTORY POSTURE.

Finally, *certiorari* is not warranted here because the case is still in an interlocutory posture. Neither the district court nor the Sixth Circuit addressed the merits of Verizon's claims in the proceedings below. Rather, both courts confined their consideration to threshold jurisdictional issues. *See* Pet. App.17a, 30a. In the event that the Michigan Commissioners fail to prevail on the merits on remand, they will have another opportunity to seek a writ of *certiorari* on the same jurisdictional issues raised in the current petition once the case has been finally resolved. There is certainly no basis for bringing the case before the Court now, before there has even been a final ruling on the merits.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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